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Patricia E. Salkin
Touro Law Center, psalkin@tourolaw.edu

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Social Networking and Land Use Planning and Regulation: Practical Benefits, Pitfalls, and Ethical Considerations

Patricia E. Salkin*

Introduction

The continuing rapid growth of Internet technology has led to the rise of what are known as “social networking sites.”¹ Social networking “describes a new set of Internet tools that enable shared community experiences, both online and in person. A community, in this context, is a group of people with common interests who connect with one another to learn, play, work, organize and socialize.”² The use of social networking

* Patricia E. Salkin is the Raymond and Ella Smith Distinguished Professor of Law, Associate Dean, and Director of the Government Law Center of Albany Law School. The Author is grateful to Albany Law School students Jennifer Clark 2011 and Amanda Cluff 2011 for their research assistance.

1. David C. Hricik, *Communication and the Internet: Facebook, E-mail, and Beyond* 11 (Jan. 1, 2010) (unpublished working paper), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1557033.

2. Leah Reeb & Mayana Anderson, *MyFace, Spacebook, Linking, Twitter...What!?: The Power of Social Networking & Technology! How It Can Benefit Your Organization!*, APA UTAH CHAPTER, Mar. 12, 2010, <http://www.utah-apa.org/pastwebcasts.htm> (quoting *A Definition of Social Media*, TECH. IN TRANSLATION (Apr. 6, 2007), http://walksquawk.blogs.com/technologyintranslation/2007/04/a_social_media_.html). There are various social networking sites, each tailored to a specific need. For example, LinkedIn is a more interactive form of social networking technology created for businesses and professionals to interact and form networks with others. Facebook enables users to create a profile, update a status, include pictures, add “friends,” and post comments on personal or friend pages. Twitter allows people to connect with a large number of other users and send short notes to them, called “tweets.” These are examples of sites that have become increasingly popular over the recent years, so much so that a survey conducted by the Nielsen Report in 2009 observed that social networking was the fourth most popular activity used on the Internet. *See*

software and sites offers a number of opportunities for those involved and interested in land use planning and regulatory decision-making to communicate with the public, with interested stakeholders, and with each other about new proposals and ideas. These sites may be created by developers, applicants, individual advocates, non-profit organizations, or governmental entities. However, the general benefits of the use of these new technologies—which include the promise of greater transparency and greater public participation—must be weighed against the potential drawbacks, such as truthfulness and accuracy of posted information, the source of the posted information, and the longevity of inaccurate information in cyberspace. Additionally, there are a number of professional ethical considerations for lawyers, planners, and other public officials who choose to utilize social networking tools,³ as well as a host of legal issues when municipalities choose to create and host these sites.

Social networking forums such as Facebook, MySpace, and Twitter all share information with a large number of Internet users. One third of American adults have a profile page on a social networking site,⁴ and a 2009 survey conducted by the Nielsen Company revealed that Internet users spent 17 percent of their time on such sites, nearly three times as much than in

Social Networks & Blogs Now 4th Most Popular Online Activity, Ahead of Personal Email, Nielson Reports, NEWS RELEASE (The Nielson Company, New York, N.Y.), Mar. 9, 2009, at 1, available at http://www.nielson-online.com/pr/pr_090309.pdf.

3. For example, ethical issues have already arisen from attorney and judge use (or misuse) of social networking sites, such as Twitter, Facebook, LinkedIn, and Wikis. See, e.g., Robert L. Shaver, *Legal Ethics Rules Apply to Attorneys' Social Media and Websites*, IDAHO ADVOC., Feb. 2010, at 16-19.

4. Robert C. Goodspeed, *Citizen Participation and the Internet in Urban Planning*, Urban Studies and Planning Program 6 (May 9, 2008) (unpublished M.C.P. thesis, University of Maryland), <http://goodspeedupdate.com/wp-content/uploads/2008/11/goodspeed-internetparticipation.pdf> (citing MARY MADDEN, PEW INTERNET & AM. LIFE PROJECT, DATA MEMO: INTERNET PENETRATION AND IMPACT 3-4 (2006), http://www.pewinternet.org/~media/Files/Reports/2006/PIP_Internet_Impact.pdf.pdf); AMANDA LENHART, PEW INTERNET & AM. LIFE PROJECT, ADULTS AND SOCIAL NETWORK WEBSITES 1 (2009), http://www.pewinternet.org/~media/Files/Reports/2009/PIP_Adult_social_networking_data_memo_FINAL.pdf.pdf.

2008.⁵ With this growing user base, it is appropriate for planners, government officials, and project sponsors to consider whether the use of these social networks as tools for inviting public input and gauging support with respect to proposed projects will result in more people being informed and participating in the land use process, yielding better plans and regulations.⁶ Furthermore, consideration must be given as to how to ensure that the use of such sites does not silence the voices of certain impacted communities who may not be users of such technology.

It is no surprise that governmental entities have begun to take part in online social networking. Governments can use social networks to promote information and services, recruit individuals for jobs, create partnerships to achieve government missions, and promote cooperation across governmental agencies.⁷ Federal governmental agencies and county/municipality agencies are significantly more likely to use social networking tools, while state agencies lag behind, possibly a result of variation among states in having the budget and expertise to implement social networking.⁸ In an effort to

5. *Nielson Reports 17 Percent of Time Spent on the Internet Devoted to Social Networking and Blog Sites, Up from 6 Percent a Year Ago*, NEWS RELEASE (The Nielson Company, New York, N.Y.), Mar. 9, 2009, at 1, available at <http://socialnetworking.procon.org/sourcefiles/NielsenAug2009.pdf>.

6. Sarah L. McGuire, *Land Use Planning and Online Social Networks: Public Participation and Web 2.0 Technology*, 33 ZONING & PLAN. L. REP., Mar. 2010, at 5.

7. *Social Networks and Government*, WEBCONTENT.GOV, http://www.usa.gov/webcontent/technology/social_networks.shtml (last visited Aug. 26, 2010).

8. *Social Networking in Government: Opportunities and Challenges*, I-POLICY.ORG (Mar. 25, 2010), <http://www.i-policy.org/2010/03/social-networking-in-government-opportunities-and-challenges.html>. In fact, several important federal governmental bodies already have been utilizing social networks as tools. For example, NASA has its own community building and workspace site, the EPA has a Facebook network, the CIA has used Facebook as a recruitment tool, and the Library of Congress has utilized Flickr for posting photos. WEBCONTENT.GOV, *supra* note 7. The Veterans Health Administration, an agency within the U.S. Department of Veterans Affairs, also created a webpage on Facebook “to provide information and news about health care services available for veterans.” Stephen Stine & Joshua Poje, *The Good, the Bad and the Ugly of Blogging, Microblogging and*

promote the use of social networking within the federal government, the National Defense University organized an event called Government 2.0 Camp, which met in March 2009 in Washington D.C. to discuss interactive online applications in an effort to increase engagement with the public.⁹

Through social networking, “local governments and their agencies are able to advertise, market, provide notice to constituents, and provide information to residents and nonresidents worldwide.”¹⁰ For example, James City County planners recently created a comprehensive plan utilizing, in part, sites such as Facebook and YouTube to educate the public on the process, post information, and increase participation.¹¹ The planners praised technology as the reason for high public participation numbers, noting that through the use of social networking sites, they were able to “solicit public input and lend transparency to the process.”¹² Sites such as Facebook and Twitter have become increasingly popular with local governments to provide constituents with information. For example, the City of New Brunswick, New Jersey, created a

Social Networking for Public Lawyers, 17 THE PUB. LAW. 13 (2009), available at

<http://www.abanet.org/tech/ltrc/publications/socialnetworkingpubliclawyers.html>. David McClure, Associate Administrator of the Office of Citizen Services within the General Services Administration observes, “It is illustrating directly that your government is working for you and part of a two-way conversation that pulls feedback, ideas and solutions from the public.” Jennie L. Phipps, *Uncle Sam’s Finding Friends On Facebook*, INVESTOR’S BUS. DAILY, June 4, 2010, available at <http://www.investors.com/NewsAndAnalysis/Article/536376/201006041751/Uncle-Sams-Finding-Friends-On-Facebook.aspx>.

9. Gautham Nagesh, *Hundreds Flock to Camp for Social Networking in Government*, NEXTGOV.COM (Mar. 30, 2009), http://www.nextgov.com/nextgov/ng_20090330_3071.php. Many governmental agencies sent representatives, including the Defense Department, Library of Congress, Census Bureau, the U.S. Air Force, and the Agriculture Department’s Farm Service Agency.

10. Carl E. Brody, Jr., *Catch the Tiger by the Tail: Counseling the Bureaucratic Government Use of Internet Media*, 83 FLA. B.J. 52, 52 (2009).

11. Dan Parsons, *Growth Plan Gets Makeover*, DAILY PRESS, Nov. 8, 2009, available at http://articles.dailypress.com/2009-11-08/news/0911070054_1_sustainable-future-development-rights-comprehensive-plan.

12. *Id.*

Twitter page to “tweet[] links to its bid notices as a means to more aggressively seek competitive bidders.”¹³ The City of Rahway, New Jersey, regularly updates its Facebook page with public information.¹⁴ Officials believe it is both a less intrusive and less costly form of communication.¹⁵ In Roanoke, Virginia, the County Board of Supervisors authorized a rezoning petition that would allow for a bank to be constructed in a certain district; before the newspapers or local T.V. station could get the story out, a Twitter message about the authorization was sent to nearly 350 members of the municipal Twitter account.¹⁶

Despite positive reports of how local governments are employing social networking technology, there are a growing number of questions regarding the extent to which their agencies can use these sites due to possible exposure to liability.¹⁷ In addition, government lawyers and agency personnel lack guidance on how relevant ethical rules will apply to social networking.¹⁸ This is beginning to create considerable concern among some municipalities. For example, the City of Redondo Beach, California, removed its Facebook page in August 2010 amidst concerns of potential legal issues surrounding open meetings and records retention.¹⁹

13. Jared Kaltwasser, *How Tweet It Is: Towns Turning to Twitter to Help Spread News*, HOME NEWS TRIBUNE, Dec. 6, 2009, available at <http://www.mycentraljersey.com/article/20091206/NEWS/91206009/How-tweet-it-is-Towns-turning-to-Twitter-to-help-spread-news>.

14. *Id.*

15. *Id.* However, since there are less than 750 fans of the city’s Facebook site, officials acknowledge that not everyone is a member, and they still send out a semi-annual newsletter. *Id.*

16. Jordan Fifer, *Government @you: Roanoke-Area Governments Reach a Broader Base with Social Networking*, THE ROANOKE TIMES, Oct. 29, 2009, available at <http://www.roanoke.com/news/roanoke/wb/224204>. However, as various departments continue using social networking tools with success, a task force was created in Roanoke, Virginia, to develop proposed regulations to address, among other things, what users may or may not post on the government social networking page. *Id.*

17. Brody, *supra* note 10, at 52.

18. Stine & Poje, *supra* note 8.

19. Kristin S. Agostoni, *Redondo Beach Does an About Face on Facebook*, DAILY BREEZE, Aug. 22, 2010, available at http://www.dailybreeze.com/news/ci_15863747. However, the City plans to continue to use other social networking tools that do not seem to present the

This Article explores how social networking sites have been used or might be used in the land use context. Part I focuses on the use of social networking for land use planning and zoning. It includes a discussion of the pros and cons of the use of social networking sites to present public information, gather public input, and invite general participation in the process, as well as to provide notice to the public of forthcoming government decision-making. This section offers concrete examples of how this technology is currently being used in the land use context. Part II focuses on the professional ethical consideration of the various players in the land use game as it specifically relates to the use of social networking sites. For lawyers, the applicable Rules of Professional Conduct are examined, while for planners, the Code of Ethics of the American Institute of Certified Planners (“AICP”) is explored for guidance. This Article concludes with a warning that, although there are benefits to the use of social networking tools for land use planning and zoning initiatives, attorneys, government agencies, planners, and others should use caution when employing these tools. They should be certain to weigh ethics and professionalism implications, social justice goals, and public participation mandates and aspirations against the advantages of these tools, and the uncertainty of how courts might apply myriad legal mandates in cyberspace.

I. Social Networking and Land Use Planning

A. Introduction

Historically, state enabling statutes have emphasized the importance of public participation in the planning and zoning processes.²⁰ Today, a fundamental principle of sustainability

same concerns. *Id.*

20. U.S. DEP’T OF COMMERCE, A STANDARD STATE ZONING ENABLING ACT (rev. ed. 1926), available at <http://www.smrpc.org/workshops/ZBA%20Workshop%20April%2029%202009/A%20Standard%20State%20Zoning%20Enabling%20Act,%201926.pdf>; see also, U.S. DEP’T OF COMMERCE, A STANDARD CITY PLANNING ENABLING ACT (1928), available at

involves the effective participation of all members of impacted communities in the planning process.²¹ In this spirit, governments have begun to test the potential use of social networking sites in the context of land use planning and zoning, finding that in some instances, social networking can be an effective outreach tool to aid land use planners, governments, and developers to reach their intended audiences.²² While it has been suggested that the use of these sites might better able the government and project sponsors to engage the community and garner greater participation in land use projects,²³ there are serious disadvantages to an over-dependence on social networking. For example, over-reliance on social networking sites to achieve public participation goals could result in discrimination against certain groups who may not have access to the Internet, such as low-income households.²⁴ Questions also remain as to whether these technologies are appropriate substitutions for traditional planning methods, and whether they can effectively replace face-to-face meetings and workshops. Regardless of the appropriate level of reliance on this method of communication, there is no doubt that, at a minimum, social networking mechanisms should be viewed as one type of enhancement to promote greater public information sharing and gathering.

<http://www.archive.org/details/standardcityplan025514mbp>.

21. Stephen M. Wheeler, *Planning for Sustainability*, in LOCAL PLANNING: CONTEMPORARY PRINCIPLES AND PRACTICE 111, 112 (Gary Hack et al. eds., 2009).

22. McGuire, *supra* note 6, at 1-2.

23. Apeckchya Karki, Using Technology to Enhance Public Participation in Urban Planning 23 (June 12, 2009) (unpublished MURP professional paper, University of Minnesota) (on file with University of Minnesota Digital Conservancy, *available at* <http://conservancy.umn.edu/bitstream/51081/1/Karki,%20Apeckchya.pdf>).

24. *See generally id.* at 9, 22, 25.

B. Examples of How Social Networking is Being Used in the Land Use Context

1. Government Use of Social Networking Sites

There are a growing number of examples of how social networking is being used by various players in the land use game. Wikiplanning™ is a proprietary program designed “to increase civic engagement” by allowing people to participate in the community planning process as well as quickly receive information on new planning projects.²⁵ The site is available twenty-four hours a day and may provide a voice to those who cannot or will not attend a public meeting, such as parents who are busy caring for their children, the physically challenged, the elderly, and those who might be afraid of public speaking.²⁶ It can be used to simulate a typical public meeting with a team leader and activity guide for participation in various surveys, blogs, chat rooms, mapping exercises, and background information.²⁷ Participants can read comments left by others and respond accordingly, and local planners are able to use the comments when recommending or making land use decisions and policy. Many people have found the tool to be an efficient way to go about the planning process, as demonstrated in testing in Charlotte, North Carolina, where over 700 participants posted twenty pages of comments about a proposal for a light rail station.²⁸ Wikiplanning was also used to secure the input of thousands of San Jose, California, residents during the 2040 Envision San Jose planning process. In four months, almost 5,000 participants joined Wikiplanning and collectively “posted over 100 images, completed 2,784 surveys, and left 240 pages of posted comments,” as compared to only 600 who

25. *Wikiplanning (TM): Engaging the Public in New Ways Online*, PLAN. & TECH. TODAY (Apr. 26, 2010, 2:36 PM), <http://planningtechtoday.org/2010/42>; see also WIKIPLANNING, <http://www.wikiplanning.org/>.

26. *Id.*

27. *Id.*

28. *Id.*

attended project workshops in person during the first year and a half of the effort.²⁹

Another tool, a wiki forum page, was created by two groups in Pennsylvania—the Local Government Academy and 10,000 Friends of Pennsylvania—for the purpose of providing information on land use planning in specific regions of the state. The forum is “intended as a resource for Pennsylvania’s planning community and for anyone interested in sound land use management in the commonwealth.”³⁰ On this site, the public can contribute to the dialogue on multi-municipal planning by adding comments, starting discussions, or exchanging information through e-mail.³¹ The public is also able to easily exchange information and ideas regarding land use planning with a vast number of people, including policymakers, decision-makers, and interested stakeholders, all outside of the traditional confines of meeting time (both date, time and time limits) and geographic location constraints.

In Philadelphia, Pennsylvania, a group who supported the creation of a neighborhood park project entered a contest sponsored by Pepsi in order to win money to finance the venture. Both Facebook and Twitter pages were created to encourage people on those networking sites to vote for the project in the contest.³² For its social-networking efforts, the group is in the running to win \$50,000 to construct a “pop-up park” in the Easy Passyunk business district. This is one example of how online social networking is transforming the land use planning process by enabling a neighborhood to launch what is essentially an online campaign for public support for a project idea.³³

The Chicago Metropolitan Agency for Planning (“CMAP”)

29. *Id.*

30. WELCOME TO THE WIKI ON MULTI-MUN. PLAN. IN PA., <http://multimuniplanning.lgawiki.wikispaces.net> (last visited Sept. 23, 2010).

31. *Id.*

32. Inga Saffron, *Local Planner Needs Votes on Pepsi Website*, PHILLY.COM (May 24, 2010), http://www.philly.com/philly/news/local/20100524_Local_planner_needs_votes_on_Pepsi_website.html.

33. *Id.*

began a planning process to create a project, “GO TO 2040,” to address Chicago’s system of transportation, development, natural environment, and social system.³⁴ To reach and engage its target audience, the planning agency began exploring new technologies, setting up accounts on sites such as Facebook, Twitter, a blog, and a Flickr account. CMAP found that these sites were very helpful in reaching its intended goals, informing, and getting input from the residents of Chicago. The CMAP Facebook page allowed CMAP to “share news items, events, and to video fans” and “provide an easy opportunity for audience building.”³⁵ In this way, CMAP was able to inform and engage its targeted audience.

2. Private Sector/Project Sponsor Use of Social Networking Sites

The public sector is not alone in the utilization of new social technology in the land use arena. In Montgomery County, Maryland, seven developers joined together and used social media to rally public support for a project that would redevelop 420 acres of land around the White Flint Metro station.³⁶ The group used various social networks in an effort to achieve its primary goal—to convince the County Council to approve the proposed adjustments to the White Flint Sector Plan, which included redoing the roads and making them “pedestrian-friendly.”³⁷ The partnership designed a website, created a Facebook page, opened a Twitter account, composed a blog, and made an e-mail group list to inform the public and

34. Anne Holub, *Social Networking as a Communications Tool for Regional Planning*, 95 PLAN. & TECH. TODAY 7 (2009), available at http://planningtechtoday.org/wp-content/uploads/2010/01/ptt_95_summer_09.pdf.

35. *Id.* at 9.

36. Miranda S. Spivack, *High-tech Helps Developers Open Doors in Montgomery; White Flint Team Goes Directly to Residents to Add Them to Lobbying Corps*, WASH. POST, Nov. 29, 2009, available at <http://www.washingtonpost.com/wp-dyn/content/article/2009/11/28/AR2009112802319.html>.

37. *Id.*

rally support.³⁸ It did so with success—after one meeting was advertised through social networks, fifty people showed up as compared to the five or six that were expected to attend.³⁹

C. *Advantages of Using Social Networking in Land Use Project Review*

1. Greater Public Participation

A 2004 Neilson/Net Ratings survey found that 75 percent of all Americans have Internet access at home, and a study by the Pew Internet and American Life project showed that 77 percent of Internet users have gone online to search for information from government agencies or to communicate with them.⁴⁰ These statistics suggest that planners and project sponsors should be able to reach people who may not have been previously informed about specific projects or who may not be able to physically attend meetings. As some of the previously discussed examples illustrate, the opportunity exists for greater public input from multiple constituencies. The increasing popularity of social networking sites enables project sponsors and project reviewers to potentially reach a larger number of people in the community.⁴¹

Social networking sites can also keep individuals updated in real-time on particular planning projects, allowing for early public participation in the process and continuing participation throughout the project approval phases.⁴² One observer notes benefits in allowing members of the public to post comments, send messages, take surveys, and view pictures, utilizing a planning method that lacks space or time constraints.⁴³ As a

38. *Id.*

39. *Id.*

40. Karki, *supra* note 23, at 9 (quoting Jennifer Evan-Cowley et al., *The Growth of E-government in Municipal Planning*, 13 J. URB. TECH. 81, 82 (2006)).

41. *See generally id.* at 9-10.

42. *See generally* Goodspeed, *supra* note 4, at 5-6 (discussing the limitations of Internet communications for urban planning purposes).

43. McGuire, *supra* note 6, at 5.

result of the technology, members of the public are able to have their questions answered in a timely manner in an interactive setting that invites follow-up and further discussion.⁴⁴ This can be especially helpful for those who may not be able to attend in-person meetings, enabling them to learn more about the prospective project at their convenience.

Not only can land use planners, the government, and project sponsors gain valuable information regarding public opinion on a project proposal, but they can spread information about it as well. Through the use of social networking sites, information can be disseminated more frequently, broadly, and efficiently to the public, including information regarding: a project (e.g., dimensions, location, environmental and public health data); the times, dates, and locations of in-person project review meetings; decisions made on a land use project throughout the progress of the process review; and answers to questions posed by members of the public.⁴⁵ Additionally, by linking social networking sites with an available Geographic Information System ("GIS"), the community may be more engaged in the planning process, as they are able to access visual and other data about what exists in the community and how it may be altered by the proposed project.⁴⁶ Furthermore, having all of the relevant project information in one easily accessible location will help players in the land use game efficiently summarize and analyze feedback in order to synthesize input and revise plans as appropriate.⁴⁷

2. Common Interest Networking

Social networking sites also allow interested stakeholders in the context of a land use initiative to network.⁴⁸ For

44. Karki, *supra* note 23, at 10.

45. *Id.* at 23-24.

46. Rick Farnsworth et al., *Local Decision Maker: A GIS-Based Decision Support System*, 95 PLAN. & TECH. TODAY 5, 5-6 (2009), available at http://planningtechtoday.org/wp-content/uploads/2010/01/ptt_95_summer_09.pdf.

47. Karki, *supra* note 23, at 19-29.

48. See generally Steven C. Bennett, *Look Who's Talking*, N.Y. ST. B.

example, sites such as Twitter and Facebook allow professional stakeholder interests to share educational information regarding their practice, the progress of trials or development plans, and to connect with colleagues, clients, or other advocacy groups to further research and invite input on proposed projects.⁴⁹ Organizing can be pivotal in winning land use battles, and social networks are a prime tool to acquire supporters who might not have otherwise been engaged in the process. Social networking sites can be used as tools that engage the public in support of or opposition to a project so that they may influence and pressure decision-makers regarding a proposed development.⁵⁰ By using the Internet, one can maintain contact information for people interested in a proposed project, send information to them, and mobilize support or opposition for the project.

3. Cost-Effective Nature of Social Networking in an Era of Fiscal Constraints

Social networking sites are cost-effective communication tools for both the players in the land use game as well as the constituents being targeted. By receiving information online, community members are able to access necessary and desired information at virtually no cost, assuming they have access to a computer and the Internet. Members of the public may not have to spend time calling government offices for information, completing Freedom of Information forms to request certain information, or attending meetings that are scheduled at less than convenient times. Planners and project sponsors also spend less money by using social networking sites to collect and communicate information. Posting surveys and information in an online forum decreases the cost of postage and paper that

ASS'N J., May 2009, at 9-14.

49. *Id.*; see also *Eight Tips for Using Social Networking to Win Land Use Battles*, PURSLANE (Mar. 12, 2010, 1:08 PM), <http://purslane.wordpress.com/2010/03/12/eight-tips-for-using-social-networking-to-win-land-use-battles/>.

50. *Eight Tips for Using Social Networking to Win Land Use Battles*, *supra* note 49.

would have been required otherwise.

4. Creates a Real-Time Public Record of Project Information

Developers, organizations, and local governments are able to post information quickly and obtain feedback with equal speed. Using social networking sites also creates a record of feedback that is stored in one place. For example, government officials, organizations, and planners may post meeting minutes, records, project proposals, maps, applicable local laws, and other important documents used in the planning process.⁵¹ By posting these documents on social networks, they may be compiled and stored for the public to view at any time during the planning process and from any location.⁵² This is a convenient method for both the public and developers—for the constituents, using social networking sites makes it easier to access the necessary information from any time or place, and developers and other players in the land use game are not left with an unorganized paper trail of project plans, records, and other documents.

The use of social networking tools for planning projects also lends transparency to the planning and decision-making processes. Anyone who can access the Internet can actively participate in the land use planning project by posting comments, asking questions, and completing surveys. They can also passively read all the information posted from other users, view their responses to questions, and comment on any issues that might concern them. In this way, the information about the planning process is open for all to see as information

51. Goodspeed, *supra* note 4, at 34.

52. The United States Marine Corps has promulgated a policy regarding the publishing of online content on social networking sites by Marines. The Corps warns Marines that they are responsible for anything they publish online, that all the content they post online is no longer within their control, and, in most cases, becomes property of the hosting site. *Social Media Guidance for Unofficial Posts*, U.S. MARINE CORPS, <http://www.usmc.mil/usmc/Pages/SocialMediaGuidance.aspx> (last visited Sept. 29, 2010).

becomes available and as comments are offered.

D. *Disadvantages and Potential Concerns with Reliance on Social Networking in the Land Use Context*

1. Discrimination in the Land Use Process

Although there are many advantages to the use of social networking sites in the land use context, the benefits must be balanced with significant shortcomings that prevent complete reliance on these tools to accomplish public notice and public participation goals. For example, a history of documented discrimination in the land use decision-making process may be intensified by over-reliance on the use of social networking tools given the reality that certain groups cannot afford Internet service or lack access to broadband. As a result, certain community voices will not be heard in the process.⁵³ One researcher notes that “access remains unequally distributed” on social networking sites, and that connection may reach only a select group of people or can be inaccessible to some members and, therefore, not all opinions will be heard.⁵⁴ Observing that Internet usage varies by age, income, race, and education, data reveals that households with low incomes also were less likely to find social networking sites in urban planning helpful, as only 53% of households with income of less than \$30,000 use the Internet, as opposed to 91% of households earning more than \$75,000.⁵⁵ There is also a discrepancy in use of the Internet by race, as 73% of white individuals use the Internet as compared to 61% of African Americans, and 33% of Spanish-speaking Latinos go online, as compared to 66% of English-speaking Latinos.⁵⁶ Furthermore, 91% of those with a college degree use the Internet, as compared to 40% of those with less than a high school degree.⁵⁷ This raises serious

53. McGuire, *supra* note 6, at 8.

54. Goodspeed, *supra* note 4, at 6.

55. *Id.* at 7.

56. *Id.*

57. Goodspeed, *supra* note 4, at 7 (citing Susannah Fox, *Internet Usage*

suspicion based on socio-economic conditions that the use of these networking tools to share information and solicit input on land use projects might reach a less diverse group of people. The elderly are another constituency subject to being silenced or marginalized with over-reliance on social networking sites. A recent study found that the elderly were far less likely to go online as compared to 18 to 29-year-olds or 30 to 49-year-olds.⁵⁸

Governments that choose to use social networking sites must address the fact that some people are unable to access the Internet for other reasons. For example, federal law requires that local governments and their agencies comply with the Americans with Disabilities Act (“ADA”) and 29 U.S.C. § 794(d).⁵⁹ Therefore, government bodies must provide individuals with disabilities with “equal access” to information posted on social networking sites, unless it would “pose an undue burden” or that doing so would “fundamentally alter the nature of the provider’s programs.”⁶⁰ As a result, governments that use social networking sites must have in place an alternative way to provide the information to disabled individuals, such as sending it through mail or reporting it by phone.

2. Social Networking is Not a Replacement for In-Person Communication

Although social networking offers quick and efficient solutions to participation in the planning process, a question remains as to whether cyberspace can adequately replace real-time and face-to-face questions and answers that town meetings provide. Since the process of planning involves engaging specific groups and working with them to create and modify plans,⁶¹ tools must be appropriate to hold a

Trends—Through the Demographic Lens, PEW INTERNET & AM. LIFE PROJECT (Nov. 6, 2006) (transcript available at http://www.pewinternet.org/PPF/r/74/presentation_display.asp)).

58. *Id.* at 6-7.

59. Brody, *supra* note 10, at 57.

60. *Id.*

61. Goodspeed, *supra* note 4, at 5.

conversation and “engage multiple distinct stakeholders, and often reach out to specific communities, organizations, and government agencies.”⁶² Using social networking sites does not always allow for this. For example, real-time, in person follow-up questions can be asked in face-to-face meetings that may not be so easy to replicate through existing social networking options. In addition, it may be difficult to arrive at a consensus or even to strike compromises using purely social networking sites for communication as people can remain somewhat, or totally, anonymous and perhaps less accountable to each other.

When people show up to a public meeting to discuss a land use project or initiative at a location in the community, they become known to others in the community (if not already identified as being part of the community). Since social networking sites are open forums, there is a risk that “outsiders” may participate in the discussion and skew the perception of what the community desires. There is also the risk that social networking sites could be set up and used by imposters and not have the imprimatur of agency or municipality. The bottom line: regardless of advances in technology, it is difficult for these tools to reproduce face-to-face conversations.

3. Controlling the Information and the Conversation, First Amendment, Open Meetings Law, and Other Considerations

Understanding who controls the information and access to virtual social networking sites is critical. For example, there can be a great deal of confusion in figuring out who the site sponsor and moderator is, whether people can delete information and add new information without a site moderator, and whether a site moderator will filter the comments made on the social networking site. It is possible for any member of the public (including a project sponsor) to open a social networking site focused on a particular land use initiative or project. It

62. *Id.* at 5 (citing ERIC DAMIAN KELLY & BARBARA BECKER, COMMUNITY PLANNING: AN INTRODUCTION TO THE COMPREHENSIVE PLAN 111-132 (2000)).

may be unclear whether the site sponsor is a proponent or opponent of the project or whether the social networking site is a neutral forum for the open exchange of ideas and information.

One initial consideration is whether people should be required to register to participate in virtual conversations about specific projects where the government hosts or endorses the method. If people are required to register, consideration must be given as to what information should be provided (name, address, phone number, email, screen name), who maintains this information, and whether others participating in the discussion should have access to this personally identifying information.

An array of legal issues may arise for government agencies regarding, for instance, the applicability of the First Amendment when the government uses privately hosted social networking sites.⁶³ Whether such sites are or may then be considered public fora is an open question.⁶⁴ If social networking sites are considered public fora, a strict scrutiny standard may apply which would prohibit local governments from limiting certain types of communication.⁶⁵ Furthermore, where the government hosts a social networking site, must the government allow the posting of all comments, regardless of relevance, language and message without running afoul of the First Amendment? As this area of the law is yet undeveloped, municipal attorneys are advising clients to proceed, if at all, with caution.⁶⁶ In addition, where members of the public

63. Amid the various legal concerns surrounding municipal social media accounts, the City of Redondo Beach has voted to disband its Facebook account. Debra Cassens Weiss, *California Town Abandons Facebook Page Amid Legal Concerns*, A.B.A. J. (Aug. 24, 2010, 4:30 AM), http://www.abajournal.com/news/article/california_town_abandons_facebook_page_amid_legal_concerns/; see also Agostoni, *supra* note 19.

64. Devala A. Janardan, *Teaching an Old Dog New Tricks*, IMLA J. LOC. GOV'T L., May/June 2010, at 29.

65. If a blog that allows for public posting is created by a government agency, there is a compelling argument to be made that the social media would be a public forum. See THE INST. FOR LOCAL GOV'T, SOCIAL MEDIA AND PUBLIC AGENCIES: LEGAL ISSUES TO BE AWARE OF 3 (2010), http://www.ca-ilg.org/sites/ilgbackup.org/files/resources/Social_Media_Paper_6-24-10_0.pdf.

66. Agostoni, *supra* note 19.

decision-making entity participate in the online exchange, determining whether open meetings laws are triggered can be tricky. Other legal issues may arise, such as revealing confidential or proprietary company information that could lead to a lawsuit, and the posting of inappropriate or discriminatory comments, and/or use of the site as a way to vent frustrations of public officials or others.⁶⁷

In response to such dangers, local governments such as Fairfax County, Virginia, have issued disclaimers. The Fairfax government states on its Facebook page that it “reserves the right to delete submissions that contain: (i) vulgar language, (ii) personal attacks of any kind, or (iii) offensive comments that target or disparage any ethnic, racial, or religious group.”⁶⁸ In addition, members cannot use the Facebook page to promote unlawful actions; advertise certain kinds of products, services or political affiliations; infringe on copyrights or trademarks; or use “personally identifiable medical information.”⁶⁹ Fairfax County also states that it reserves the power to delete submissions that are “clearly off topic,” a sort of catch-all that allows moderators to delete virtually anything they deem not related to the discussion.⁷⁰ Therefore, although the public is free to post on social networking websites regarding a project, they are limited to a certain degree in what they may say. While the adoption of policies and guidelines is a good idea, it is doubtful that any policy that has the effect of restricting speech in cyberspace can pass constitutional muster.

4. Records Retention and FOIL

State statutes provide various record retention and access policies for municipalities. However, just what is considered

67. Mildred L. Culp, *Your Job and the Lure of Social Media*, MIAMI HERALD, Dec. 20, 2009, at E4.

68. *Facebook Comments Policy*, FAIRFAX COUNTY VA., <http://www.fairfaxcounty.gov/opa/getfairfax/facebook-comments-policy.htm> (last updated Nov. 13, 2009); see also Janardan, *supra* note 64, at 29.

69. *Facebook Comments Policy*, *supra* note 68.

70. *Id.*

the “record” of a virtual meeting on an online site that potentially retains all posted comments and documents remains unanswered. Presumably, information posted on a social networking site maintained or administered by a government agency is subject to applicable Freedom of Information laws. However, where the government uses a site maintained by a third party, can the record retention obligation be imposed on the private or non-profit sector to maintain copies of all posted information for a certain period of time? The Florida Attorney General, in a recent opinion regarding a city-sponsored Facebook page, stated that the page was created for “a public purpose and in connection with the transaction of official business of the city,”⁷¹ and that therefore, communication through such a webpage is subject to the public records law.⁷² Members of the public are also guaranteed access to any communication made by officials of the municipality on a social networking site. As a result, a response made by another official to the state would form “an illegal public meeting” and potential liability may arise.⁷³ The Attorney General notes that the Florida public records law trumps state privacy rights as well, and thus, “public employees and elected officials must be aware that written content created in any form will be subject to review.”⁷⁴

5. Proceed with Caution

Land use attorneys and government agencies participating in social networking sites would be advised to start with the realization that what is being posted on social networking sites is public information and likely a public record. This means that a planner or government agency employee should not post information that neither she nor the agency would want to be

71. Brody, *supra* note 10, at 56; *see also* Bill McCollum, *Advisory Legal Opinion—AGO 2009-19*, THE OFF. OF THE ATT’Y GEN. OF FLA. (Apr. 23, 2009), <http://www.myfloridalegal.com/ago.nsf/Opinions/25F14F90483F3901852575A2004E46CB>.

72. McCollum, *supra* note 71.

73. Brody, *supra* note 10, at 56.

74. *Id.*; *see also* McCollum, *supra* note 71.

made public.⁷⁵ While it is a good idea to designate a moderator to oversee or facilitate the use of the site, clear guidelines must be developed for the moderator to follow both in terms of her authority, if any, to approve or delete comments, and her responsibilities in terms of reporting potential inappropriate posting to the municipal attorney. One observer notes that, "Social networking is just another communication tool. They are more approachable for some people because it's not face to face. The trick is in figuring out which method of communication works best for each of your contacts."⁷⁶ Given both the risk of isolating constituents through using only the virtual means of communication, as well as the danger of marginalizing certain groups who are unable or choose not to access the Internet, municipal attorneys seeking to avoid discrimination lawsuits must ensure that face-to-face communication and Internet-based-social-networking are used in tandem to build stronger networks with the public and other involved stakeholders.

II. Social Networking Sites and Ethical Considerations for Planners, Lawyers, and Decision Makers in Land Use

A. *Ethical Rules Governing Attorney Interaction on Social Networking Sites*

A 2009 study by the American Bar Association (ABA) found that 43 percent of lawyers are members of at least one social networking site, and of those lawyers, 12 percent of the firms to which they belonged were members of such sites as well.⁷⁷ Used appropriately, lawyers should be able to "reach out

75. Culp, *supra* note 67.

76. Tracy Crevar Warren, *Can Facebooking Kill Face-to-Face Networking?*, AICPA (May 10, 2010), http://www.cpa2biz.com/Content/media/PRODUCER_CONTENT/Newsletters/Articles_2010/CPA/May/FacebookKills.jsp (quoting Tracey Segarra, director of marketing at Garden City, N.Y.-based Margolin, Winer & Evens, LLP) (internal quotation marks omitted).

77. Steven C. Bennett, *Ethics of Lawyer Social Networking*, 73 ALA. L. REV. 113, 113-14 (2009).

directly to their constituents, take a more active role in shaping their public image, and overcome longstanding institutional barriers.”⁷⁸ Social networks also provide lawyers with the ability to communicate and build relationships with other professionals who share the same interests without barriers such as distance and time,⁷⁹ and can be a marketing tool for prospective clients.⁸⁰ ABA Model Rule 7.1 states that “[a] lawyer shall not make a false or misleading communication about the lawyer or the lawyer’s services.”⁸¹ This prohibition has extended to statements written/posted on blogs and social networking sites such as Twitter and Facebook.⁸²

Rule 7.2 of the ABA Model Rules of Professional Conduct addresses the subject of lawyer advertising, providing in part that “a lawyer may advertise services through written, recorded, or electronic communication, including public media.”⁸³ Comment 3 states that the use of electronic media is a permissible forum for advertising, but warns against real-time electronic solicitation of prospective clients.⁸⁴ Land use attorneys might view the availability of social networking sites as a way of building a potential client base. For example, it might be possible to identify neighborhood groups of public advocates supporting or opposing a project. Lawyers must be mindful, while posting on these sites, to resist the temptation to improperly solicit clients, such as suggesting that they can assist in certain legal challenges. Comment 1 to the Rule states that these forms of solicitation are impermissible because of the chance that an attorney may be intimidating or can unduly influence an overwhelmed prospective client.⁸⁵ With this in mind, courts have generally viewed e-mails transmitted on social networking sites as a form of targeted mailing and not

78. Stine & Poje, *supra* note 8.

79. *Id.*

80. *Id.*

81. MODEL RULES OF PROF’L CONDUCT R. 7.1 (2004).

82. Hricik, *supra* note 1, at 12.

83. MODEL RULES OF PROF’L CONDUCT R. 7.2(a) (2004).

84. *Id.* R. 7.2, cmt. 3.

85. *Id.* R. 7.3, cmt. 1.

improper solicitation.⁸⁶ Therefore, attorneys using the mailing system to solicit clients on social networking sites such as Facebook or LinkedIn should comply with attorney advertising rules.⁸⁷ However, the status of “synchronous communications” (i.e. chat rooms, instant messaging) is less clear as features from these tools are difficult to place into strict categories such as targeted mailing or in-person solicitation.⁸⁸ The emerging trend has been to treat synchronous communications as a form of in-person solicitation,⁸⁹ and therefore, an attorney must use extreme caution when using such applications.⁹⁰

The California Bar Association issued an advisory opinion in 2004 addressing the use of Internet chat rooms or real time electronic communication to communicate with prospective fee-paying clients and whether such conduct would violate California Rule of Professional Conduct 1-400.⁹¹ The opinion stated that chat room communication is not telephonic or in person, and thus is not, by itself, prohibited solicitation under Rule 1-400(B).⁹² However, subdivision (D)(5) of Rule 1-400, which prohibits communications that intrude or cause duress (similar to concerns in Comment 1 to ABA Model Rule 7.3), had been violated.⁹³ This was due to the fact that the chat room was occupied by mass disaster victims and was created for the purpose of emotional support, not to be encountered by an attorney seeking to be retained.⁹⁴ Ultimately, this advisory opinion demonstrates that land use attorneys, in California especially, should be vigilant when determining the mode of

86. Hricik, *supra* note 1, at 13.

87. *Id.*

88. *Id.* (citing Cydney Tune & Marley Degner, *Blogging and Social Networking: Current Legal Issues*, 962 PLI/PAT 113, 133 (2009)).

89. Tune & Degner, *supra* note 88.

90. *Id.* The rationale most used for categorizing this type of communication as in-person solicitation is that it puts the client on the spot and creates a situation where coercion might take place. *Id.*

91. Cal. Bar Comm. on Prof'l Responsibility & Conduct, Formal Op. 2004-166 (2004), available at <http://ethics.calbar.ca.gov/LinkClick.aspx?fileticket=9QzkXEac5QQ%3d&tabid=838>.

92. *Id.*

93. *Id.*

94. *Id.*

electronic communication to be utilized when soliciting or communicating with prospective clients. Chat rooms can be utilized by the California land use attorney, but the nature and purpose of the chat room should be taken into consideration before any solicitation or advertising is commenced. If a chat room was created for emotional support for flood victims, for example, a land use attorney should not enter the chat room seeking to be retained to handle insurance claims or such.

The Philadelphia Bar Association recently issued an advisory opinion regarding the use of social media by attorneys for the purpose of interacting with prospective clients.⁹⁵ The Bar Association was asked to provide instruction regarding the use of blogging or other forms of online client solicitation.⁹⁶ The Bar Association opined that these forms of communication may be regulated by Pennsylvania Rule 7.3, which forbids solicitation by in-person, telephonic, or real time electronic communication.⁹⁷ The opinion explains that the purpose behind Rule 7.3 was to ban these forms of solicitation, as they could induce an overwhelmed prospective client to experience undue influence, intimidation, and feelings of immanency due the close contact with, and the conduct of, an attorney.⁹⁸ The Bar Association opined that these factors were not present in blogging, electronic mailing, and chat rooms, since these venues are more similar to print solicitations where the viewer has the opportunity to take her time to respond, not respond, or choose to not view the communication.⁹⁹ Blogging, electronic mail, and chat rooms also do not afford a sense of social awkwardness experienced by a prospective client if she declines to respond to the attorney's solicitations, further differentiating these forms of solicitations from those that are banned under

95. Phila. Bar Ass'n Prof'l Guidance Comm., Op. 2010-6 (2010), *available at* <http://www.philadelphiabar.org/WebObjects/PBAReadOnly.woa/Contents/WebServerResources/CMSResources/Opinion%202010-6.pdf>.

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.*

Rule 7.3.¹⁰⁰ The opinion, however, offered a few cautionary bits of advice to attorneys, stating that the normal rules regarding solicitation apply, that other forms of electronic communication, such as voice Internet chats, may pass the threshold into in-person communication, violating Rule 7.3, and that solicitations may violate the Rules if the communications are written to produce a sense of immediacy in the prospective client.¹⁰¹ Also, the Bar Association recommends that attorneys retain all solicitations conducted through blogging, electronic mail, or chat rooms for a period of no less than two years.¹⁰² Therefore, land use attorneys soliciting prospective clients in Philadelphia may find a less restricted use of e-mail, blogging, and “synchronous communications” but should nonetheless remain vigilant of the advice offered in the opinion.

A Washington D.C. land use attorney may find herself in a different position than other land use attorneys, since D.C. Rule of Professional Conduct 7.1, Communications Concerning a Lawyer’s Services, does not bar all in-person solicitation.¹⁰³ The Rule states that there can be no in-person solicitation of a prospective client when the attorney is misleading, being coercive or harassing, or when the potential client is in a mental state where they could not exercise reasonable judgment.¹⁰⁴ Comment 5 notes that in-person communication can include telephonic communication, but does not include e-mail messages.¹⁰⁵ An opinion from 2000, though applying an older version of the Rules of Professional Conduct, provides insight on still existent portions of the law.¹⁰⁶ The opinion provides that the use of web pages to solicit potential clients is governed by Rule 7.1(a), which prohibits all misleading or false

100. *Id.*

101. *Id.*

102. *Id.*

103. D.C. RULES OF PROF’L CONDUCT R. 7.1 (2007).

104. *Id.*

105. *Id.* R. 7.1 cmt. 5.

106. D.C. Bar Ass’n Legal Ethics Comm., Op. 302 (2000), available at http://www.dcbar.org/for_lawyers/ethics/legal_ethics/opinions/opinion302.cfm#footnoteOne.

communications.¹⁰⁷ However, websites used to find potential clients should contain a prominent disclaimer which uses a mechanism to verify that users have read relevant information.¹⁰⁸ The opinion further references a section, which no longer exists but is similar to the amended version,¹⁰⁹ providing that the attorney should be mindful of the potential client's mental state while using web page solicitations.¹¹⁰

Two years after this opinion was rendered, the D.C. Bar Association was asked whether it was permissible for lawyers to participate in online chat rooms where attorneys communicate with other Internet users seeking legal information, so long as they comply with the Rules of Professional Conduct.¹¹¹ The Bar Association declined to opine whether or not chat room communications fell within the in-person solicitation or written solicitation category.¹¹² Instead, the Committee stated that chat room communications share some characteristics with in-person solicitation but are different in other ways.¹¹³ Due to the live nature of discussions in the chat rooms, the opinion notes that lawyers need to be careful of the prohibition of solicitations that involve the use of undue influence.¹¹⁴ However, the Committee noted that chat room communications are less coercive than in-person communications and as such, potential clients have the option to ignore the communications. Furthermore, it cautioned that lawyers need to be careful about establishing attorney-client relationships in chat rooms, stating the best way to avoid

107. *Id.*; see also D.C. RULES OF PROF'L CONDUCT R. 7.1 (1991).

108. Op. 302 (citing Walter A. Effross, *A Website Checklist*, LEGAL TIMES, Mar. 1, 1999, at S34).

109. D.C. RULES OF PROF'L CONDUCT R. 7.1(b)(1)(C) (2007).

110. Op. 302; see also D.C. RULES OF PROF'L CONDUCT R. 7.1(b)(3) (1991).

111. D.C. Bar Ass'n Legal Ethics Comm., Op. 316 (2002), available at http://www.dcbar.org/for_lawyers/ethics/legal_ethics/opinions/opinion302.cfm#footnoteOne.

112. *Id.*

113. *Id.*

114. *Id.*; see D.C. Bar Ass'n Legal Ethics Comm., Op. 316 (2002), available at http://www.dcbar.org/for_lawyers/ethics/legal_ethics/opinions/opinion316.cfm; see also D.C. RULES OF PROF'L CONDUCT R. 7.1(b)(2) (1991).

creating these types of relationships is to avoid answering specific legal questions.¹¹⁵ D.C. land use attorneys, while utilizing social networking sites, should remember that they may not use false or misleading statements, and that if they attempt to use a mode of communication that is similar to in-person communication, Comment 5 to Rule 7.1 should be considered.¹¹⁶

In a 1998 formal opinion issued by the New York City Bar Association, the Committee opined that DR 2-101 requires a law firm that establishes a website to retain a copy of the website for one year.¹¹⁷ In addition, they determined that when a law firm creates a website with the intent of peaking interest in existing or potential clients in retaining the firm, this constitutes "advertising" and "other publicity" within the meaning of DR 2-101.¹¹⁸ More specifically, DR 2-101(F) applies to broadcast advertisements and section F provides in part, "if such advertisement is directed to a predetermined address . . . [it] shall be retained by the lawyer or law firm for a period of not less than one year following the last date of mailing or distribution."¹¹⁹ The Committee also considered whether a law firm may host a listserv-type discussion area on legal subjects.¹²⁰ The Committee answered in the affirmative, stating

115. Op. 316.

116. D.C. RULES OF PROF'L CONDUCT R. 7.1 cmt. 5 (2007). It states in relevant part:

[P]rohibits in-person solicitation in circumstances or through means that are not conducive to intelligent, rational decisions. Such circumstances and means could be the harassment of early morning or late night telephone calls to a prospective client to solicit legal work, or repeated calls at any time of day, and solicitation of an accident victim or the victim's family shortly after the accident or while the victim is still in medical distress.

Id.

117. Ass'n of the Bar of the City of N.Y., Formal Op. 1998-2 (1998), available at <http://www.abcnny.org/Ethics/eth1998-2.htm>.

118. *Id.*

119. *Id.*

120. *Id.*

that this question was regulated by paragraphs A, C, and E of DR 2-104, which provides in part that “a lawyer may speak publicly or write for publication on legal topics so long as the lawyer does not undertake to give individual advice.”¹²¹ It was advised, however, that law firms that establish discussion areas should be vigilant and cautious since written word is generally given more weight than oral discussion.¹²² Furthermore, even if a law firm put a disclaimer on the discussion board, this may not relieve the firm from an attorney-client relationship that may have been created.¹²³ These are important considerations for lawyers who may be asked by clients in the land use game to develop, open, or host a social networking forum on a particular issue or project.

1. Conveying Accurate Information Concerning Practice and Specialization

ABA Model Rule 5.5 governs the unauthorized practice of law and states: “(a) A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so.”¹²⁴ This includes implying that one is a specialist in an area of law when that is not actually the case. Land use lawyers who utilize social networking sites should also be mindful of the rules governing communication of services and fields of practice and/or specialization. Model Rule 7.1 stresses that a lawyer “shall not make a false or misleading communication about . . . the lawyer’s services. A communication is misleading if it contains a material misrepresentation of fact or law”¹²⁵ This, read in conjunction with Model Rule 7.4, which states in part “a lawyer shall not state or imply that a lawyer is certified as a specialist in a particular field of law,” may limit what land use lawyers are able to state on social networking

121. *Id.*

122. *Id.*

123. *Id.*

124. MODEL RULES OF PROF’L CONDUCT R. 5.5 (2004).

125. *Id.* R. 7.1.

sites.¹²⁶ For example, lawyers using social networking sites should be mindful not to give legal advice to prospective clients in areas of law for which they have no experience. Answering particularized, state-specific questions in jurisdictions of which they are not licensed can also be problematic.¹²⁷ Questions abound as to whether lawyers are participating on these sites and in discussions as a member of the public or as an attorney intending to render legal advice and advocate on behalf of a client, or whether participation is construed as advertising or business development.

2. Attorney-Client Relationship

Tied directly to giving legal advice is the creation of an attorney-client relationship. The ABA Model Rules place great emphasis on the sanctity of the attorney-client relationship as demonstrated by the eighteen rules pertaining specifically to this topic.¹²⁸ Most notably, Rule 1.18 addresses the duties owed to a prospective client. The Rule states, “a person who discusses with a lawyer the possibility of forming a client-lawyer relationship . . . is a prospective client.”¹²⁹ The Rule goes on further to state that “[e]ven when no client-lawyer relationship ensues, a lawyer who has had discussions with a prospective client shall not use . . . information learned in the consultation”¹³⁰ Attorneys may inadvertently create an attorney-client relationship when using social networking sites by engaging in live conversations, utilizing e-mail message functions, and posting on blog forums. For example, if a client “reasonably relies” on the attorney’s advice through a social networking site, an attorney-client relationship may be formed.¹³¹ “Reasonably relies” is a subjective standard and as such, it has been suggested that attorneys post disclaimers on

126. *Id.* R. 7.4(a).

127. Hricik, *supra* note 1, at 14.

128. MODEL RULES OF PROF’L CONDUCT R. 1.1–1.18 (2004).

129. *Id.* R. 1.18.

130. *Id.*

131. Tune & Degner, *supra* note 88, at 134.

social networking sites before rendering what might be construed by a prospective client as a legal advice.¹³² Where an attorney-client relationship is found, it can disqualify not only the lawyer but also the entire firm from representing a client. Model Rule 1.18 specifically states, “[i]f a lawyer is disqualified from representation . . . no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter”¹³³ Professor Judy M. Cornett warns that the real danger of blogging is realized when the reader is allowed to reply to the posts of the attorney-author, as the interaction can lead to expectations of a relationship being formed.¹³⁴ She advises lawyers desiring to halt the formation of an attorney client relationship to keep the discussions informal and include a disclaimer on the blog.¹³⁵

3. Examples of Unprofessional Conduct Using Social Networking Sites

The following examples, while not directly tied to matters related to land use issues, are instructive as to how lawyers may engage in unprofessional conduct using social networking tools. In one reported news account, a lawyer asked a judge for a continuance due to the death of her father, but posted status updates and pictures on Facebook illustrating a week of drinking and partying.¹³⁶ A lawyer who blogged about a judge, calling her an “Evil, Unfair Witch” was called to appear before the Florida bar, who then issued him a \$1,200 fine and a reprimand for his comments.¹³⁷ An Illinois assistant public

132. *Id.*

133. MODEL RULES OF PROF'L CONDUCT R. 1.18 (2004).

134. Judy M. Cornett, *The Ethics of Blawging: A Genre Analysis*, 41 LOY. U. CHI. L.J. 221, 250 (2009).

135. *Id.* at 251-52.

136. Molly McDonough, *Facebooking Judge Catches Lawyer in Lie, Sees Ethical Breaches*, A.B.A. J. (July 31, 2009), http://www.abajournal.com/news/article/facebooking_judge_catches_lawyers_in_lies_crossing_ethical_lines_abachicago/.

137. John Schwartz, *A Legal Battle: Online Attitude v. Rules of the Bar*, N.Y. TIMES, Sept. 9, 2009, at A1, available at <http://www.nytimes.com/2009/09/13/us/13lawyers.html>.

defender lost her job over blog postings that spoke negatively of judges she appeared before.¹³⁸ Complaints on social networking sites posted by attorneys about clients and opposing counsel have been found, both of which breach ethical rules. Even judges can get caught up in the social networking traps. A judge for the Ninth Circuit United States Court of Appeals posted “off-color” remarks that were accessible on his family’s Web server and caused the judge to be investigated.¹³⁹

4. Attorney Ethics Opinions Regarding Social Networking with Non-Clients

It is not uncommon for land use lawyers to search for and retain expert witnesses on behalf of their clients. Lawyers might use “listservs” or other social networking sites to do this, yet judges or other decision makers regarding the project/proposal may also be reading the lawyer’s inquiries. California Rule of Professional Conduct 5-300(B)(5) prohibits a lawyer from engaging in ex parte communications with judges concerning the merits of pending matters. While an inquiry on a listserv concerning an expert may not cross the threshold of “specific knowledge,” even an “innocent (i.e., negligent) ex parte contact would still violate 5-300(B), since no *intent* to engage in improper communication is required.”¹⁴⁰ Therefore, lawyers should be mindful of who has access to the listserv because even an unintentional ex parte communication would violate 5-300(B). The opinion went on further to warn judges to be careful about responding to such postings on a listserv.

138. *Id.*

139. *Id.* (The judge was cleared of any wrongdoing; however, this account (as well as others) serves as a reminder that attorneys and judges (as well as members of zoning board of appeals who serve in a quasi-judicial capacity), need to be mindful of the material they post on social networking sites).

140. L.A. County Bar Ass’n Prof’l Responsibility & Ethics Comm., Formal Op. 514 (2005), available at <http://webcache.googleusercontent.com/search?q=cache:mmzbQFD0JcIJ:www.legalethics.com/include/content/Eth514%25208-19-05.doc+bar+association+opinions+-+judges+and+internet&cd=28&hl=en&ct=clnk&gl=us>.

Although judges (and those serving in quasi-judicial capacities) may not be prohibited from participating in bar associations or writing in public forums, they should be cautious about what they are posting. It is important for a judge who communicates on a listserv to be aware that she is communicating with unknown members of the public who may be individuals who appear before the judge.¹⁴¹

Listsers are an important mode of communication that lawyers and judges alike can utilize; however, they do not allow for real time conversation. An important feature in the social networking arena is the chat room, which creates an environment where live conversations can take place. This type of forum can be very useful for those involved in land use projects because it gives the public a chance to ask questions and have them answered promptly. This exchange may give the individuals involved a better idea of the concerns and issues surrounding a project. Ethical issues may be implicated, however, when lawyers use chat rooms. A lawyer's duty to inform the public about the law is one of the most recognized obligations.¹⁴² Lawyers, however, are not insulated from consequences when an attorney-client relationship is formed as a result of inadvertently giving advice in a chat room. Lawyers may give information, including discussions about legal principles, trends, and considerations; however, giving advice is not recommended. Moreover, lawyers participating in chat rooms should explicitly state that they are providing general information only.¹⁴³

If a land use attorney should be in the position where witnesses are part of the judicial proceedings, he or she may be curious of the social networking activity of these witnesses, perhaps to invalidate the witness's claims or to tarnish their reputations. Although there has not been much discussion of such a situation in the land use context, it has been evaluated

141. *Id.*

142. D.C. Bar Ass'n Legal Ethics Comm., Op. 316 (2002), *available at* http://www.dcbar.org/for_lawyers/ethics/legal_ethics/opinions/opinion316.cfm.

143. *Id.*

regarding broader legal ethics issues, such as pretexting.¹⁴⁴ In 2009, the Philadelphia Bar Association was asked if the use of a social networking site by a third party to “friend” a witness was a practice that complied with the applicable ethics rules.¹⁴⁵ The third party would supply only truthful information to the witness, not disclose the purpose for the “friending,” and would attempt to gain information relevant to the litigation.¹⁴⁶ The Bar Association explained that, under Pennsylvania Rule of Profession Conduct 5.3(c)(1), the lawyer would be responsible for the third parties conduct.¹⁴⁷ The opinion continues that the conduct itself would violate Rule 8.4(c); the conduct described is deceitful since the third party is omitting to disclose a material fact to the witness.¹⁴⁸ Furthermore, the Bar Association was of the opinion that this course of conduct violated Rule 4.1, which bars a lawyer knowingly making a false statement of fact or law.¹⁴⁹ The opinion notes that if the attorney was given access to the social networking site without the use of deceit, the action would be permissible.¹⁵⁰

B. *Ethical Considerations for Land Use Planners*

Lawyers are not the only players in the land use game who are subject to rules of professional conduct. Professional planners, who are members of the American Institute of Certified Planners (“AICP”), are subject to a code of ethics.¹⁵¹

144. Jeremy R. Feinberg, *Report on Pretexting – Recent Cases & Ethics Opinions*, 199 NYPRR 457 (2010), available at <http://lazar-emanuel.com/Report%20on%20Pretexting%20%E2%80%93%20Recent%20Cases%20and%20Ethics%20Opinions.pdf>.

145. Phila. Bar Ass’n Prof’l Guidance Comm., Op. 2009-02 (2009), available at http://www.philadelphiabar.org/WebObjects/PBAReadOnly.woa/Contents/WebServerResources/CMSResources/Opinion_2009-2.pdf.

146. *Id.*

147. *Id.*

148. *Id.*

149. *Id.*

150. *Id.*

151. Patricia E. Salkin, *Examining Land Use Planning and Zoning Ethics from a Planner’s Perspective: Lessons for All Stakeholders in the Real Estate Game*, 34 REAL EST. L.J. 508, 508 (2006).

The current version of the AICP Code of Ethics and Professional Conduct, adopted in 2005, lists the ethical principles, objectives, and rules of conduct for certified planners. A primary ethical principle is to build “better, more inclusive communities.”¹⁵² While the use of social networking may help to advance this goal, as discussed in Part I, it may, in some cases, conflict with some principles of the Code. For example, Principles A(1)(e) states that planners should “give people the opportunity to have a meaningful impact on the development of plans and programs that may affect them. Participation should be broad enough to include those who lack formal organization or influence.”¹⁵³ In addition, A(1)(f) directs that planners shall “seek social justice by working to expand choice and opportunity for all persons, recognizing a special responsibility to plan for the needs of the disadvantaged and to promote racial and economic integration.”¹⁵⁴ In addition, Rule 20 of the AICP Code prohibits planners from engaging in discrimination.¹⁵⁵ Using Internet-based social networking as a planning tool, however, may thwart this goal, as statistically it is shown that Internet accessibility is not available to everyone, particularly those in low-income households.¹⁵⁶ Not only are there economic discrepancies in accessibility, but inconsistencies in race, age, and language as well. This might be viewed as a sort of social injustice, a discriminatory process, as some people will be excluded from the planning process because of their lack of accessibility.

Similar dilemmas can be seen in the AICP Rules of Conduct themselves. Rule 1 requires planners to provide “adequate, timely, clear, and accurate information on planning issues.”¹⁵⁷ This Rule emphasizes that planners have an obligation not to post misinformation on social networking sites. Similar to attorney ethical rules, Rule 11 of the AICP

152. AICP CODE OF ETHICS & PROF'L CONDUCT pmbl. (2009), available at <http://www.planning.org/ethics/ethicscode.htm>.

153. *Id.* § A(1)(e).

154. *Id.* § A(1)(f).

155. *Id.* § B(20).

156. Goodspeed, *supra* note 4, at 6-7.

157. AICP CODE OF ETHICS & PROF'L CONDUCT § B(1) (2009).

Code provides that planners may not “solicit prospective clients or employment through the use of false or misleading claims, harassment, or duress.”¹⁵⁸ Planners should proceed, therefore, with caution about what they post on social networking sites relating to their professional employment and work.

Rule 7 of the AICP Code protects client confidences from being exposed by planners. Professional planners may not share confidential information gained from a client or employer in the professional relationship unless it is “(1) required by process of law, or (2) required to prevent a clear violation of law, or (3) required to prevent a substantial injury to the public.”¹⁵⁹ Therefore, certified planners must be careful not to inadvertently share confidential information when discussing specific projects on a social networking site.

Further Rule 8 of the AICP Code states that planners “shall not, as public officials or employees, engage in private communications with planning process participants if the discussions relate to a matter over which we have authority to make a binding, final determination if such private communications are prohibited by law or by agency rules, procedures, or custom.”¹⁶⁰ It is possible that certain conversations through social networking media could constitute “private conversations” with planning process participants, regardless of whether the planner is aware of the identity of the individual at the other end of the electronic communication. Another rule prohibits the failure to disclose the interests of the planner’s client or employer when participating in the planning process and also prohibits participation in an effort to conceal the true interests of a client or employer.¹⁶¹ Because social networking sites may allow users to remain anonymous, AICP planners must be mindful of the need to self-identify and to identify who their clients are when they post information and comments to social networking sites.

158. *Id.* § B(11).

159. *Id.* § B(7).

160. *Id.* § B(8).

161. *Id.* § B(19).

C. Ethical Considerations for Quasi-judicial Bodies

Zoning boards of appeal function at times in a quasi-judicial capacity. Therefore, it is useful to consider analogies to restrictions and advisory opinions issued as they pertain to judges at least for as persuasive guidance as to how zoning board members should conduct themselves on social networking sites. An opinion from the Supreme Court Judicial Ethics Advisory Committee in Florida addressed the limitations of judicial activity on social-networking sites.¹⁶² This Committee notes that while judges can use these sites individually or to create pages for their political campaigns, it cautions that judges may not become, in any way, “friends” on a social networking site with a lawyer who may appear before them in a judicial proceeding. Such behavior could give the impression that the “friended” lawyer is in a “special position” to influence the judge.¹⁶³ The Committee also noted, in a more recent opinion, that a disclaimer on the social networking page, which states that being a “friend” on the judge’s page is not indicative of any relationship and that it would not create any special treatment, would not be effective in countering the presumption of influence and thus does not change the effect of opinion 2009-20.¹⁶⁴ Taking a slightly different stance, the Committee further opined that a judicial assistant could be “friends” with lawyers who could appear in front of the assistant’s judge since their dissemination of personal information on social networking sites would “not compromise the integrity of the court system.”¹⁶⁵

162. Fla. Judicial Ethics Advisory Comm., Op. 2009-20 (2009), *available at* <http://www.jud6.org/LegalCommunity/LegalPractice/opinions/jeacopinions/2009/2009-20.html>.

163. *Id.*

164. Fla. Judicial Ethics Advisory Comm., Op. 2010-06 (2010), *available at* <http://www.jud6.org/LegalCommunity/LegalPractice/opinions/jeacopinions/2010/2010-06.html>.

165. Fla. Judicial Ethics Advisory Comm., Op. 2010-04 (2010), *available at* <http://www.jud6.org/LegalCommunity/LegalPractice/opinions/jeacopinions/2010/2010-04.html>.

The Advisory Committee also delivered opinions regarding the use of social networking sites and election campaigns. The Advisory Committee stated that if there is a committee conducting an election campaign for the judge, the candidate may post material on the committee's page on a social-networking site, or have supporters become "fans" of the candidacy, as long as the judge or committee does not control who can become a fan and there is no impression of bias.¹⁶⁶ In a more recent opinion, the Advisory Committee opined that a candidate for judicial office may "friend" or be "friended" by lawyers who would appear before the candidate should she win.¹⁶⁷ These cases show that zoning board of appeals members should be sensitive to the effects that could result from associating with others on social networking sites and should set forth their best effort to ensure the integrity of the system is preserved.

These opinions beg the question of whether members of zoning boards of appeal should have their own personal social networking sites. Also, there are considerations as to whether they may "friend" or communicate with people who routinely appear before them or even who might in the future appear before them. The South Carolina Department of Justice's Advisory Committee on Standards of Judicial Conduct issued an opinion addressing the limitations of a magistrate judge's interaction with law enforcement officials or employees on a social networking site.¹⁶⁸ They concluded that there would be no "appearance of impropriety" if the judge was a member of Facebook and friends with law enforcement officials and

10/2010-04.html.

166. Fla. Judicial Ethics Advisory Comm., Op. 2010-20 (2010), *available at* <http://www.jud6.org/LegalCommunity/LegalPractice/opinions/jeacopinions/2009/2009-20.html>.

167. Fla. Judicial Ethics Advisory Comm., Op. 2010-05 (2010), *available at* <http://www.jud6.org/LegalCommunity/LegalPractice/opinions/jeacopinions/2010/2010-05.html>.

168. S.C. Advisory Comm. on Standards of Judicial Conduct, Op. 17-2009 (2009), *available at* <http://www.judicial.state.sc.us/advisoryOpinions/displayadvopin.cfm?advOpinNo=17-2009>.

employees so long as they do not discuss any aspect relating to the judge's duties as magistrate.¹⁶⁹ The Ethics Advisory Committee of the South Carolina Bar also adopted a policy in which judges were held accountable, even if they were unaware of the information that the social networking website was generating about them under theory that "by requesting access to and updating any website listing . . . a lawyer assumes responsibility for the content of the listing."¹⁷⁰ Most states adhere to the policy that if a lawyer or judge decides to engage in social networking, she still must maintain Rule 1.6 client confidentiality. This is demonstrated in a case in which an Illinois attorney who reported her cases on an online blog was disciplined because she was breaching the confidential nature of her client's case and communications.¹⁷¹

The Ethics Committee of the Kentucky Judiciary also addressed whether a Kentucky judge may participate in a social networking site and be "friends" with people who may appear before the judge in court.¹⁷² The committee concluded that the answer to this issue is a "qualified yes."¹⁷³ While participants of social networking may be designated "friends," they did not find that, by itself, this "reasonably convey[s] to others an impression that such persons are in a special position to influence the judge."¹⁷⁴ However, if the judge's impartiality is questioned (if the "friend" has a close personal relationship with the judge), recusal from a case may be required.¹⁷⁵ Judges should be aware of "whether any such online connections, alone or in combination with other facts, rise to the level of a 'close

169. *Id.*

170. John P. Hutchins, *Legal Ethics in the Age of Internet Mobility*, 1001 PLI/PAT 527, 539 (2010) (quoting S.C. Bar, Ethics Advisory Op. 09-10 (2009), *available at* http://www.scbar.org/member_resources/ethics_advisory_opinions/&id=678).

171. *Id.* (citing Schwartz, *supra* note 137).

172. Ethics Comm. of the Ky. Judiciary, Formal Op. JE-119 (2010), *available at* <http://courts.ky.gov/NR/rdonlyres/FA22C251-1987-4AD9-999B-A326794CD62E/0/JE119.pdf>.

173. *Id.*

174. *Id.*

175. *Id.*

social relationship' requiring disclosure and/or recusal."¹⁷⁶

A 2009 advisory opinion from New York states that, provided the judge does not violate the Rules Governing Judicial Conduct, she may join an Internet social network.¹⁷⁷ However, it cautions that judges must also exercise an appropriate amount of discretion in how they use the social networking site and how it may impact their duties under the Rules Governing Judicial Conduct.¹⁷⁸ The Committee realized that there are many reasons judges might want to be a part of a social network and does not believe it is inappropriate for them to do so.¹⁷⁹ In addition, a judge may socialize with attorneys who appear in her court in person or via technology.¹⁸⁰ However, the judge must consider whether her conduct rises to the level of a "close social relationship" that would give the appearance of impropriety.¹⁸¹ The judge is required to avoid impropriety and conduct herself so that activities do not detract from the dignity of this position.¹⁸² In North Carolina, a judge was reprimanded for contacting an attorney through a social network in an active case.¹⁸³ The judge that was presiding over a custody matter had "friended" the defendant's attorney on Facebook.¹⁸⁴ Both the judge and the attorney each posted comments regarding the case, and sometimes even responded to the other's comment.¹⁸⁵ The Judicial Standards Commission found that this was improper ex parte communication and the judge was remanded.¹⁸⁶ It is

176. *Id.* (quoting N.Y. State Bar Ass'n, Op. 08-176 (2009)), available at <http://www.courts.state.ny.us/ip/judicialethics/opinions/08-176.htm>.

177. N.Y. State Bar Ass'n, Op. 08-176 (2009), available at <http://www.courts.state.ny.us/ip/judicialethics/opinions/08-176.htm>.

178. *Id.*

179. *Id.*

180. *Id.*

181. *Id.*

182. *Id.*

183. Ken Strutin, *Pitfalls of Social Networking for Judges and Attorneys*, N.Y. L.J., Mar. 17, 2010, available at <http://www.law.com/jsp/lawtechnologynews/PubArticleLTN.jsp?id=1202446299127>.

184. *Id.*

185. *Id.*

186. *Id.*

clear that the rise of social networking requires clarification of ethical boundaries on social networking sites for both attorneys and judges.

Members of zoning boards of appeal should be seen as having ethical boundaries when it comes to the use of social networking sites that are similar to that of judges. Most states maintain that there is nothing improper with a judge joining a social networking site, as it is a beneficial tool for social networking and garnering support in a political campaign. However, impropriety, or the appearance thereof, would not be tolerated in order to maintain the integrity of the judiciary. Public confidence is necessary to the judicial system.¹⁸⁷ Listing “friends” that are attorneys, witnesses, or parties to the matter can be an issue, as it could cause impressions of impropriety to other judges, such as that the judge might favor one attorney over another in his court.¹⁸⁸ Similarly, zoning board members should not be able to favor one party over another in a matter because of their personal relationship through social networking, as they have a duty of impartiality to the members of the community. To do otherwise would create mistrust in the zoning process, questioning the integrity of the land use decision-making system.

III. Conclusion

The use of social networking tools to advance the conversation about myriad planning and land use regulatory processes and projects is an exciting prospect, but one which requires lawyers and planners to proceed with caution to ensure full and fair participation by all members of the public. Furthermore, lawyers must proactively ensure the development of legally appropriate policies to protect the interests of their clients, and all stakeholders in the land use game must be mindful of the ethical and professionalism traps

187. Denelle J. Waynick, *Judicial Disqualification: The Quest for Impartiality and Integrity*, 33 How. L.J. 449, 449 (1991) (citing *Scott v. United States*, 559 A.2d 745, 754 (D.C. 1989)).

188. Strutin, *supra* note 183, at 5.

that confront them in the use of social networking sites. There is no doubt that this is a developing area of law and practice for those engaged in land use.